Detroit Newspaper Agency, d/b/a Detroit Newspapers, The Detroit News, Inc., and The Detroit Free Press, Inc. ***and*** **Detroit Typographical Union No. 18, Communications Workers of America, AFL–CIO** ***and*** **Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO** ***and*** **Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL–CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL–CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL–CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL–CIO** ***and*** **CWA/ITU Negotiated Pension Plan.** Cases 7–CA–37361, 7–CA–37417, 7–CA–37427, 7–CA–37606, 7–CA–37385, 7–CA–37783, 7–CA–38185, 7–CA–38442, and 7–CA–38184

March 4, 1999

ORDER DENYING MOTION

BY MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On August 27, 1998, the National Labor Relations Board issued a Decision and Order in which the Board found, inter alia, that Respondent Detroit News (Respondent News) engaged in unfair labor practices that caused a strike and that the resulting strike was an unfair labor practice strike from its inception in July 1995. *Detroit Newspapers*, 326 NLRB 700 (1998). Specifically, the Board found that prior to the strike Respondent News violated Section 8(a)(5) of the Act by unilaterally implementing its proposals regarding merit pay and television assignments, and by refusing to furnish the Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO (the Guild) with requested information regarding its merit pay and overtime exemption proposals. The Board, however, reversed and dismissed the administrative law judge's finding that Respondent Detroit Newspapers Agency (DNA), the production partnership of Respondents Detroit News and Detroit Free Press, had violated Section 8(a)(5) prior to the strike by departing from an agreement to bargain jointly with the representatives of its production employees (the Unions**,** collectively with the Guild, the Charging Parties) on economic issues common to all of DNA's collective-bargaining units.

On September 10, 1998, the Respondents filed a motion for reconsideration of the Decision and Order pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations. The Acting General Counsel and the Charging Parties filed briefs in opposition to the motion. The Respondents filed a reply brief.

The Respondents contend that the Board erred when it found that the Unions' insistence on adherence to the multistage, joint bargaining procedure was lawful. Instead, they contend, the Board should have found that the Unions unlawfully insisted on a nonmandatory subject of bargaining. The Respondents further contend that the strike undertaken, at least in part, to protest the abrogation of the joint bargaining agreement was an unprotected strike, rather than an unfair labor practice strike. Consequently, the Respondents conclude that the strikers did not have protected reinstatement rights.

Having considered the Respondents' motion, we deny it as both untimely raised and lacking in merit.[1] On the former point, the Respondents did not contend either in answer to the complaint or in the hearing before the judge that the Charging Parties' conduct with respect to the joint bargaining agreement was unlawful and that the strike was therefore unprotected. In fact, at trial, the Respondents repeatedly maintained, contrary to their current argument, that the Charging Parties' strike was an economic strike. As such it would be both lawful and statutorily protected. The Respondents first suggested that this conduct was unlawful in their exceptions to the judge's decision and supporting brief to the Board.

It is well established that "[a] contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).[2] This case presents no reason for departure from this precedent**,** notwithstanding the Board's reversal of the judge's finding that Respondent DNA violated 8(a)(5) with respect to the joint bargaining agreement**.** The legality of the Union's conduct was potentially at issue during the trial, when the Respondents were defending against the Section 8(a)(5) allegation and the General Counsel's claim that the strike was an unfair labor practice strike. The Respondents could and should have raised the defense then. Certainly a motion for reconsideration of the Board's decision did not present the first opportunity to make the argument.[3]

Moreover, even if timely raised, we would find that the Respondents' argument lacks merit. In the Board's discussion of the 8(a)(5) joint bargaining agreement issue, we expressly stated that "[w]e do not suggest that the Unions' insistence on adherence to the two-stage bargaining procedure was unlawful here." *Detroit Newspapers*, supra at 704. We did not intend to suggest by our

[1] For the reasons set forth in her partial dissenting opinion (326 NLRB 700 at 723–727), Member Liebman would have found that Respondent DNA violated Sec. 8(a)(5) by repudiating the joint bargaining agreement. She agrees, however, with the rationale set forth here for denying the Respondents' motion for reconsideration.

[2] See also *International Paper Co.*, 319 NLRB 1253, 1276–1277 (1995), and cases cited there.

[3] See, e.g., *Chicago Tribune Co.*, 304 NLRB 259 (1991), where the Board directed the administrative law judge to consider arguments which were similar to those made by Respondents here, but, unlike here, were timely raised as affirmative defenses by the respondent employer in its answer to the complaint.

use of the phrase "insistence on adherence" that the Unions' conduct was susceptible to interpretation as unlawful, or unprotected intransigence. We find that neither their negotiating position nor their strike action ran afoul of the statutory limitations on nonmandatory bargaining.

In *NLRB v. Borg-Warner Corp.*, 356 U.S. 324, 349 (1958), the Supreme Court held that the statutory duty to bargain in good faith extends only to "wages, hours and other terms and conditions of employment," i.e., "mandatory" subjects of bargaining. On matters concerning those subjects, a party may insist on its position to the point of impasse, for in those areas "neither party is legally obligated to yield." Id. As to other "nonmandatory" subjects, however, different rules apply. Each party is free to make proposals on nonmandatory subjects, "to bargain or not to bargain, and to agree or not to agree." Id. However, a party may not insist upon agreement to a nonmandatory subject as a condition precedent to entering any collective-bargaining agreement. Id. Such conduct violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." Id.

Consistent with *Borg-Warner* principles, analysis of the legality of conduct vis-a-vis a nonmandatory subject requires examination of the impact of such conduct on negotiations for mandatory subjects. See, e.g., *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985) (finding that employer did not unlawfully insist on nonmandatory proposal in absence of evidence that the employer set forth the proposal as a prerequisite or condition of agreement on mandatory subjects of bargaining). Compare *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230 fn. 2, and 240 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974) (finding that union representing separate units of employees unlawfully insisted on nonmandatory subject where the union insisted, as a condition of reaching agreement in the separate units, that negotiations include the other units and threatened that no offer with respect to any single unit would be accepted until identical offers had been made for all of the other units).

It is therefore well established that a party "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum." *Longshoremen ILA v. NLRB*, 277 F.2d 681, 683 (D.C. Cir. 1960). Accord: *Taft Broadcasting Co.*, supra, 274 NLRB at 261. Furthermore, "[t]he mere fact of an impasse coincidental to continued disagreement on a nonmandatory subject of bargaining will not trigger the *Borg-Warner* unfair labor practice." *Latrobe Steel v. NLRB*, 630 F.2d 171, 181 (3d Cir. 1980).

By the same token, the fact that a party is engaged in a strike or lockout does not, by itself, mean that the party has conditioned its willingness to enter into an agreement on acceptance of all of its proposals, including those relating to nonmandatory subjects. Thus, in *Oil Workers v. NLRB*, 405 F.2d 1111 (D.C. Cir. 1968), the court agreed with the Board that the employer, who had locked out its employees, was not unlawfully insisting on its nonmandatory proposal because the evidence showed that the nonmandatory proposal was not the cause of the impasse that led to the lockout.

There are certain situations in which the Board has found that a strike or other economic action in support of a proposal on a nonmandatory bargaining subject is unlawful under *Borg-Warner* principles. These situations have involved a strike in support of insistence to impasse on the inclusion of a proposed nonmandatory subject in any collective-bargaining agreement[4] or a strike in furtherance of the unlawful condition that further bargaining depends on acquiescence to a demand on a nonmandatory subject.[5]

This case does not involve the aforementioned *Borg-Warner* unfair labor practice situations.[6] This is not a case where the Unions were proposing, insisting to impasse**,** or striking in support of a nonmandatory proposal to merge the parties' historical single-employer, single-union units.[7] Furthermore, there is no basis for finding

[4] For instance, in *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991), the Board recognized potential merit in the respondent employer's affirmative defense that strike action was unprotected because the unions had insisted *to* impasse on proposals for nonmandatory bargaining subjects. The Board subsequently affirmed the judge's finding that the unions did not bargain to impasse on any nonmandatory subject. Those employees who participated in the strike therefore retained their statutory protection. *Chicago Tribune Co.*, 318 NLRB 920 (1995).

In *Plumbers Local 141 (International Paper Co.)*, 252 NLRB 1299 (1980), the respondent unions violated Sec. 8(b)(3) by insisting *to impasse* on the inclusion of a proposal for a nonmandatory subject (requiring employees in right-to-work states to pay a representation fee) and by threatening to strike or picket in support of this insistence.

Finally, in *Electrical Workers IBEW Local 1049 (Lewis Tree Service)*, 244 NLRB 124 (1979), the respondent union unlawfully insisted to impasse and threatened to strike over its contract proposal on the nonmandatory subject of expanding seniority rights beyond the existing bargaining unit.

[5] In *Nassau Insurance Co.*, 280 NLRB 878, 891–892 (1986), the respondent union unlawfully insisted to impasse upon nonmandatory conditions that the employer submit its final offer in written form or that a stenographer attend negotiations to record the employer's offer. When the employer refused these demands, the union suspended negotiations and commenced a strike. The strike was unprotected because it was in support of the unlawful demands.

[6] It also does not present the situation of a case cited by the Respondents where the finding of an unlawful strike did not involve any contemporaneous bargaining about mandatory or nonmandatory subjects. See *Operating Engineers Local 12*, 246 NLRB 510, 511–512 (1979) (the Board found that the respondent unions violated Sec. 8(b)(3) by striking to compel an employer to withdraw the employer's petition for judicial review of a Board decision).

[7] Thus, although the parties characterized their arrangement as one for joint bargaining over economic issues common to all units, such as across-the-board wage increases, as we noted in our initial opinion, this was never part of an agreement contemplating that all parties would be bound by group action. *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). Thus it was more in the nature of coordinated bargaining rather than a form of joint bargaining that would effectively result in a merger of units such that no single union representative could agree to a contract until all had agreed. See *Don Lee Distributor, Inc. v. NLRB,* 145

that the Unions unlawfully conditioned further bargaining within those historical units on Respondent DNA's adherence to the limited joint bargaining agreement. After Respondent DNA reneged on the joint bargaining agreement, the Unions vigorously protested this action, but they continued to negotiate on a multiple single-union basis over all mandatory subjects, and they discussed economic issues that had been reserved for joint bargaining under the breached agreement. Indeed, Respondent DNA did not unequivocally object to further discussion of joint bargaining. Rather, it unilaterally conditioned joint bargaining on progress in single-unit negotiations. In sum, although Respondent DNA's *breach* of the joint bargaining agreement was undisputedly *a* cause of the ensuing strike, as were the unfair labor practices of Respondent News, the record does not show that the Unions sought through the strike to condition further bargaining about mandatory subjects on Respondent DNA's return to the parties' prior agreement on a nonmandatory subject of bargaining.[8]

Simply stated, the Unions' conduct in bargaining and in striking did not bear the hallmark of a *Borg-Warner* unfair labor practice. It was not "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." 356 U.S. at 349.

Based on the foregoing, we find no basis for reconsidering our decision in this case. We shall deny the Respondents' motion.

ORDER

The Respondents' motion for reconsideration is denied.

F.3d 834, 843 (6th Cir. 1998), cert denied 525 U.S. 1102 (1999) (explaining difference between "coordinated bargaining" in which each member of the group "would retain independent contract-making authority" and "joint bargaining," in which the group "retains effective veto power over the bargaining behavior of individual group members"). See also *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904, 906 (1986) (because unit scope is a nonmandatory subject, unions acted unlawfully in demanding arbitration of grievances that effectively sought merger of separate units).

Member Hurtgen concludes that the Respondent did not prove, by a preponderance of the evidence at trial, that the Unions insisted to impasse on multiunit bargaining. This insufficiency of proof stems at least in part from the fact that the Respondent was not making this contention at trial.

[8] Cf. *Union Carbide Corp.*, 165 NLRB 254, 255 (1967), enfd. sub nom. *Oil Workers Local 3-89 v. NLRB,* 405 F.2d 1111 (D.C. Cir. 1968) (respondent employer did not insist to impasse on its nonmandatory bargaining demand, and, after impasse on other mandatory subjects, its lockout of employees did not have the purpose of obtaining the union's agreement to that demand). Accord: *Dehli-Taylor Refining Div.*, 167 NLRB 115, 117 (1967).